In the Supreme Court

of the United States

OCTOBER TERM, 1975

No. 75-1049

BARBARA R. HUTCHISON,

Petitioner,

v.

LAKE OSWEGO SCHOOL DISTRICT NO. 7, DR. THOMAS COTTLE, EDWARD ALLEN, SAMUEL H. MELROSE, JR., GARRY R. BULLARD and JAMES S. PUTNAM, in their capacities as members of the LAKE OSWEGO SCHOOL DISTRICT BOARD,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR DENYING THE WRIT

I

It is a matter of discretion whether to allow attorneys fees.

A party is generally not entitled to an award of attorneys fees as a matter of right. *Alyeska Pipeline Service Co.* v. *The Wilderness Society*, 95 S. Ct. 1612 (1975). Section 706(k) of Title VII of the Civil

Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5 (k), provides that ". . . the court, *in its discretion, may* allow the prevailing party . . . a reasonable attorney's fee as part of the costs. . . ." (Emphasis added). The statute is permissive and allows the court to consider the circumstances of each case in deciding when to award fees.

II

The Court of Appeals acted properly in denying an award of attorneys fees.

Petitioner prevailed in her action in district court against the school board and its individual members on claims of violations of her rights under the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964. The only issue on which she did not prevail concerned the immunity of the School District. She was awarded attorneys fees.

Respondents appealed to the Court of Appeals for the Ninth Circuit and petitioner cross-appealed. The Court of Appeals ruled in favor of respondents that the Equal Protection Clause had not been violated and that the individual school board members had acted in good faith and were therefore immune from liability. It ruled in favor of petitioner that the School District was subject to liability. Thus, respondents prevailed in part and petitioner prevailed in part. Under these circumstances the Court of Appeals acted reasonably

and did not abuse its discretion in denying petitioner an award of attorneys fees on appeal. See *Schaeffer* v. *San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1008 and fn. 5 (9th Cir. 1972).

Petitioner contends that the purposes of Title VII will be frustrated if she is denied attorneys fees on appeal citing this Court's decision in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). *Newman* was a racial discrimination case under Title II involving a sandwich shop and five drive-in restaurants. The district court found prohibited discrimination as to the sandwich shop but not as to the drive-in restaurants. The Court of Appeals went beyond the district court and also found prohibited discrimination as to the restaurants. Thus, unlike the present case, plaintiff in *Newman* was clearly the prevailing party both in the district court and on appeal.[1]

The Court of Appeals in *Newman* remanded the case to the district court for consideration of an award of attorneys fees, but only to the extent that the district court found the defenses advanced were for the purpose of delay and in bad faith. This Court stated that such a standard for an award of attorneys fees

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[1] There is no conflict among the Circuits. In each of the other cases relied upon by plaintiff the party who was awarded attorneys fees was clearly the only "prevailing" party or the matter of attorneys fees for the appeal was not discussed. *Lowry* v. *Whitaker Cable Corp.*, 472 F.2d 1210 (8th Cir. 1973) (defendant appealed and lost); *Evans* v. *Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974) (no discussion); *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) (no discussion); *Berg* v. *Richmond Unified School Dist.*, 11 F.E.P. Cases 1285 (9th Cir. 1975) (defendant appealed and lost); *Palmer* v. *Rogers*, 10 E.P.D. ¶ 10,499 (D. D.C. 1975) (plaintiff appealed and won).

is not proper and held that ". . . one who succeeds in obtaining an injunction under [Title II] should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust. . . ." The writer of the per curiam opinion noted that *Newman* was "not even a borderline case" because the defenses advanced there were "patently frivolous" and denial of attorneys fees would have been "manifestly inequitable." 390 U.S. at 402 and fn. 5.

It would not be "manifestly inequitable" in this case to deny petitioner an award of attorneys fees on appeal. Petitioner has already been granted an award of attorneys fees in the district court and, therefore, the purposes of Title VII will not be frustrated by denying her an additional award on appeal. Moreover, respondents' defenses were not patently frivolous and were well taken on appeal. Respondents obtained substantial relief in the Court of Appeals.[2]

At the very least this case presents special circumstances or is borderline. It does not present a question of national importance, nor is there a conflict among the Circuits so as to justify review by this Court.

III

The Court of Appeals properly denied costs to petitioner and awarded costs to respondents.

Petitioner would have this Court review this case

[2] It is not "irrelevant," as plaintiff contends, that the judgment against the individual defendants was reversed on appeal.

to establish a rule that would require an award of costs on appeal to the party who obtained a judgment in the district court if the judgment is affirmed in any respect. Such a rule has not been followed in the Circuits, nor would such a rule be proper.

Section 706(k) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(k), gives the court discretion to allow costs to the prevailing party. Where a party to an appeal obtains substantial relief, in whole or in part, or where the party has performed a useful service in bringing the matter before the Court of Appeals, the Circuits have followed a rule that the court may award costs to that party or may divide costs equally. *Environmental Defense Fund, Inc.* v. *Callaway*, 497 F.2d 1340, 1342 (8th Cir. 1974); *Newman* v. *Stein*, 464 F.2d 689, 698 (2d Cir. 1972); *Graham* v. *Texas Gulf Sulphur Company*, 457 F.2d 418, 427-28 (5th Cir. 1972); *Merrill* v. *Builders Ornamental Iron Co.*, 197 F.2d 16, 26 (10th Cir. 1952). Such a rule is proper and was correctly applied in this case by the Court of Appeals.

CONCLUSION

For the foregoing reasons, this is not an appropriate case for review and the petition for writ of certiorari should be denied.

Respectfully submitted,

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